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February 24, 2010

Attorney General Eric Holder
Acting Deputy Attorney General Gary Grindler
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder and Acting Deputy Attorney General Grindler:

We are writing to express concern about the inclusion of a reference to the Federal Communications Commission in the February 12, 2010, Justice Department press release announcing the formation of a new Task Force on Intellectual Property chaired by the Deputy Attorney General.

We support the idea of fighting “intellectual property IP crimes” and of focusing attention on “the links between IP crime and international organized crime,” as the press release suggests. Such efforts target true bad actors – criminal elements engaged in large-scale infringement of IP rights.

The very end of the press release, however, states that the DoJ intends to “leverage existing partnerships with federal agencies and independent regulatory authorities such as the Department of Homeland Security *and the Federal Communications Commission*” (emphasis added). We believe that involving the FCC in copyright enforcement efforts is inappropriate and highly problematic.

First, enforcement of IP law is entirely outside the FCC’s jurisdiction. The Communications Act tasks the FCC with regulating the provision of communications capability by wire or radio. Nothing in the Act gives the agency any role in enforcing IP laws.

Indeed, looking beyond just IP law, nothing in the Act gives the FCC authority to prevent or prosecute violations of non-communications laws in general, even when violations involve the use of communications facilities. The FCC does not have general jurisdiction over Internet activity or over the content of telecommunications. In the modern world of telecommunications, it is inevitable that illegal activities of all kinds occur on telephone, wireless, and Internet communications networks – but that does not make it the FCC’s job to stop such behavior. In short, in the telecommunications context, the FCC’s general role is to promote the availability of effective communications systems across the country, not to police when and whether those systems are used for unlawful purposes.



Second, since the FCC has no investigatory or prosecutorial functions, there is really only one thing it could bring to the table with regard to IP enforcement: its influence over the communications companies it regulates. The reference to the FCC, therefore, would seem to suggest an intention to take the highly controversial approach of trying to require or pressure communications providers, and particularly Internet service providers (ISPs), to more actively police IP violations on their networks. Imposing such law enforcement responsibilities on ISPs would represent a dramatic and dangerous reversal of U.S. law and policy.

Congress has expressly rejected the notion that ISPs should be held responsible for policing user behavior. 47 U.S.C. § 230(c)(1) states that ISPs and other “interactive computer services” shall not be treated as the publishers or speakers of “any information” provided by users. 17 U.S.C. § 512(a) directs that ISPs shall not be held liable for any copyright damages when users transmit infringing material. These legislative safe harbors reflect a deliberate policy choice – a choice to allow ISPs to focus on empowering communications by and among users *without* the ISPs monitoring, supervising, or playing any other kind of “gatekeeping” role with respect to such communications. That policy choice has yielded significant benefits, creating an Internet environment that fosters a tremendous amount of innovation, speech, collaboration, civic engagement, and economic growth.

The DoJ should not promote an IP enforcement strategy that is inconsistent with that policy choice. Conscripting ISPs for online law enforcement efforts would mark a major shift in the role of ISPs in the United States and undermine the policy choices embedded in the current legal framework. It also could result in ISP practices that affect the privacy and free expression of lawful Internet users all over the country. Some ISP practices, if they are prompted by government action and have an impact on online speech, could raise serious constitutional concerns as well.

Moreover, a broad effort to enlist ISPs could detract from an emphasis on targeting bad actors and criminal elements, by putting undue enforcement focus on well-intentioned parties like mainstream ISPs and ordinary Internet subscribers. There are plenty of true bad actors, and that is where any DoJ enforcement initiative should place its priority.

For these reasons, we believe that DoJ should not look to the FCC as a significant partner in IP law enforcement efforts. Suggestions that DoJ should work closely with the FCC on this matter reflect a potentially dangerous misunderstanding of the role of the FCC, the role of ISPs in the United States, or both.

Sincerely,

Leslie Harris, President & CEO
David Sohn, Senior Policy Counsel
Center for Democracy & Technology

cc: Julius Genachowski, Chairman
Austin Schlick, General Counsel
Federal Communications Commission

Victoria A. Espinel
U.S. Intellectual Property Enforcement Coordinator